FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Discussion of Emergency Regulatory Action Regarding Section 85306, Transfer of Pre-Proposition 34 Funds; Proposed Emergency Regulation 18530.2.

Date: December 31, 2002

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As the Commission is well aware, passage of Proposition 34 brought significant changes to various aspects of the Political Reform Act ("Act"). Among those changes is a new statute, section 85306 of the Government Code. Generally speaking, the new law governs the treatment of contributions that were raised before the effective date of Proposition 34.

At its December 2002 meeting, the Commission considered adoption of a fact sheet prepared by staff to assist the public and regulated community in complying with the provisions of the proposition. Several hypothetical issues were addressed in the fact sheet that entailed application of section 85306. The primary issue before the Commission is to determine the scope of an exception to the Act's general requirement that transfers between a candidate's committees must be attributed to specific contributors. At that time, the Commission approved the fact sheet without the section 85306 issues and directed staff to draft an emergency regulation that provides options for the Commission's consideration. This memorandum discusses issues with respect to implementation of section 85306 and proposes emergency regulatory language crafted to carry out the Commission's determinations.

JUSTIFICATION FOR EMERGENCY REGULATION

Section 85306 addresses transfer among a candidate's own committees of funds raised by the candidate prior to the effective date of Proposition 34. Specifically, the statute allows transfer of funds *unattributed* to specific contributors. In some circumstances, however, the Commission may determine that transfer of "pre-34"[1] funds must nevertheless be attributed to specific contributors. In light of the fact that some candidates are facing immediate decisions regarding the transfers of these funds that will

[1] This memorandum uses the colloquial term, "pre-34," to refer to funds referenced in subdivisions (b) and (c) of section 85306, to wit: funds a candidate possesses before the effective date of Proposition 34.

be governed by this section, the need for explicit guidance on these issues is pressing. So that candidates may proceed with the best information, staff proposes adoption of an emergency regulation clarifying the scope of section 85306.

I. INTRODUCTION

Proposition 34 added Section 85306 to the Act:

> "**§ 85306. Transfers Between a Candidate's Own Committees; Use of Funds Raised Prior to Effective Date.**
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> "(a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate. Contributions transferred shall be attributed to specific contributors using a "last in, first out" or "first in, first out" accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in Section 85301 or 85302.
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> "(b) Notwithstanding subdivision (a), a candidate for elective state office, other than a candidate for statewide elective office, who possesses campaign funds on January 1, 2001, may use those funds to seek elective office without attributing the funds to specific contributors.
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> "(c) Notwithstanding subdivision (a), a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors."

Section 82024, already part of the Act, defines "elective state office" as follows:

> "'Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization."

To summarize the statute, subdivision (a) states the general rule that transfer of funds between a candidate's own committees (such as an candidate's existing 2002 Senate committee and future 2006 Treasurer committee) must be attributed to specific contributors using certain accounting methods. In this way, a candidate[2] for office cannot impermissibly circumvent the contribution limits.[3]

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[2] Under the Act, a "candidate" includes officeholders. (§§ 82007, 84214; Reg. 18404, subd. (d).)

Subdivisions (b) and (c), provide an exception to the general rule in subdivision (a), requiring attribution when transfers are made, by allowing a candidate to transfer *without* attribution those funds which the candidate possessed before the effective date of Proposition 34.[4]

The central issue to be decided by the Commission and addressed in the proposed regulation is this: once funds are transferred to a committee otherwise governed by contribution limits, do the transferred funds retain their "pre-34" status? In other words, is there no legal limit (assuming practical limitations can be accommodated) to a candidate's transferring of "pre-34" campaign funds without attribution from one election to another? If there is in fact some limitation on the exception provided by subdivision (b) and (c) of section 85306 to the general rule of attribution contained in subdivision (a) of the statute, in what circumstances is the limit reached? Referring to the language employed in subdivisions (b) and (c) of the statute, what does it mean to "possess" funds on a certain date? What does it mean to "seek elective office" and does that refer to an infinite number of offices?

It may be helpful to maintain a hypothetical in the back of one's mind against which the various options may be applied. The illustration below involves an Assembly officeholder with a 2000 committee. The committee's funds all were possessed prior to January 1, 2001. The candidate then opens a 2004 Senate committee in 2002 and transfers all the funds to that committee. The third circle illustrates the candidate changing his or her mind and deciding to run for a different office, Attorney General, after the transfer above:

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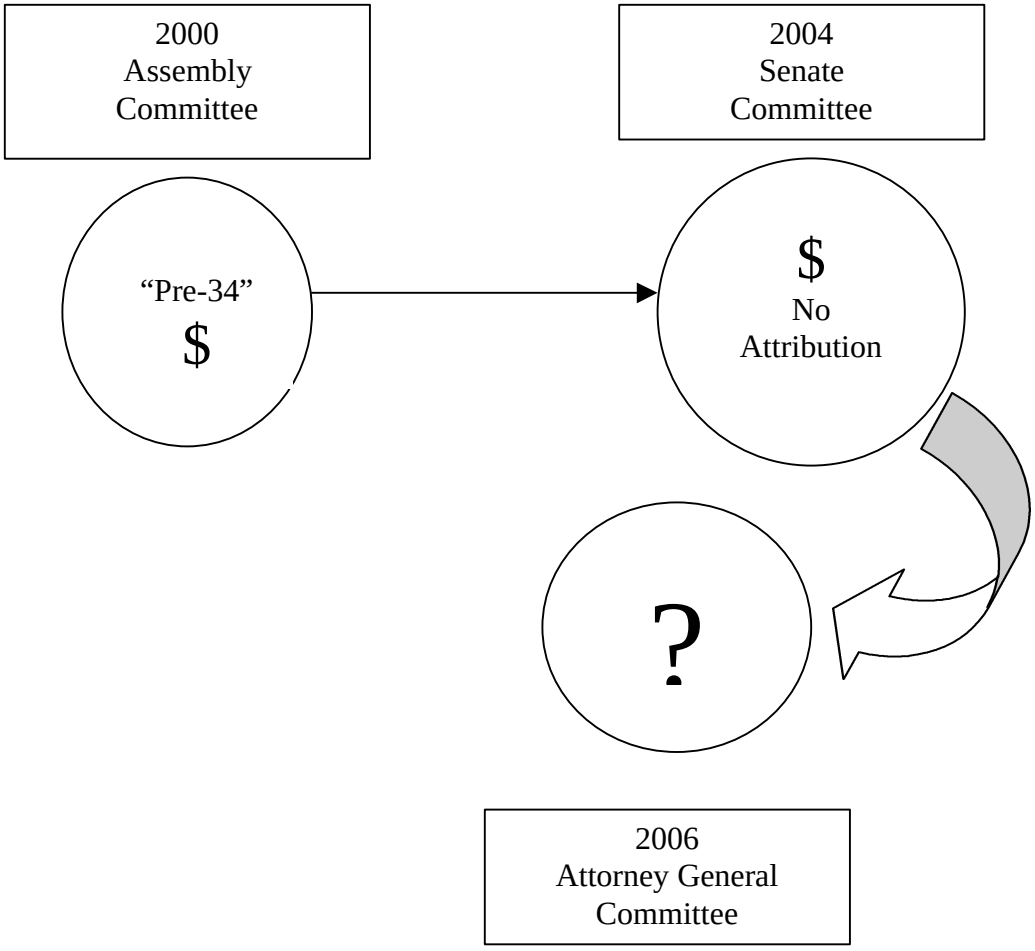
[3] Section 85317 allows a candidate for elective state office to carry over contributions from one election for elective state office to a committee for a "subsequent election for the same elective state office" *without* attribution. (§ 85317.) Interpreting the scope of this provision, the Commission adopted regulation 18537.1, which defines "subsequent election for the same elective state office" to mean the election "to the next term of office immediately following the election/term of office for which the funds were raised." (Reg. 18537.1, subd. (c).)

[4] For candidates for state elective office *other* than candidates for statewide office, the contribution limits and section 85306 went into effect on January 1, 2001. For candidates for statewide office, the contribution limits and section 85306 went into effect on November 6, 2002.



The illustration above shows that the *first* transfer, from the 2000 committee to the Senate committee, is *always* allowed to be made without attribution under subdivisions (b) and (c). The issue for the Commission is how to treat *future* transfers from the Senate committee to another Committee and whether they are free of the attribution requirements. Put another way, the statute clearly permits at least one transfer for the purpose of "seeking elective office." Where the uncertainty arises is whether and under what circumstances *additional* transfers of the same funds are permitted should the candidate change his or her mind and run for a different office, or simply desire to bring the funds forward to consecutive campaigns.[5]

[5] The law generally prohibits a candidate from appearing on the same ballot for two different offices. (Cal. Elec. Code § 8003, subd. (b).) Thus, a candidate may not run for more than one office at the same time *in the same election*. A candidate may, however, have more than one committee open if the candidate seeks offices whose elections are in different years. For example, a candidate cannot run in the same year for both an Assembly seat and a Senate seat. The same candidate may, however, maintain open committees and "run" at the same time for an Assembly seat in 2004 and a Senate seat in 2006.

Finally, neither section 85306 nor the proposed regulation governs carry over of contributions raised in connection with one election for elective state office to pay for a subsequent election for the *same* elective state office. Section 85317 expressly provides an exception to the general attribution rule of 85306 in the context of, for instance, an Assembly member seeking reelection to the same Assembly seat. Under those circumstances, the candidate may "carry over" those funds without attribution. (§ 85317; Reg. 18537.1.)

II. INTERPRETIVE AIDS

A. ***SEIU v. FPPC*:**

1. Transfer Ban

In 1988, voters passed Proposition 73, amending the Act in many of the same areas as Proposition 34. Proposition 73 contained section 85304 of the Government Code, which *banned* transfers from candidate committees:

> "85304. No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited."

This provision, among others of the proposition, was challenged by labor unions and others in a lawsuit against the Commission seeking to bar its enforcement. (*SEIU v. FPPC* (1990) 747 F.Supp. 580 (E.D. Cal.).) The Commission defended the ban on several grounds. With respect to the ban on transfers between a candidate's own committees ("intra-candidate"), [6] the Commission argued the ban was valid on the notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind. (*Id*., at p. 590.) The court ruled, later affirmed by the Court of Appeals, that the argument was insufficient to support a limitation on what it labeled expenditures by the candidate's committee. (*Id.*)[7] The Commission defended the inter-candidate transfer ban on the ground that it was necessary to thwart attempts to circumvent the contribution limits enacted with

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[6] "Inter" candidate transfers refer to transfers between one candidate and another candidate. "Intra" candidate transfers refer to transactions between committees belonging to the same candidate.

[7] The Court of Appeals for the Ninth Circuit indicated in a footnote that the Commission did "not appear to dispute that the intra-candidate transfer ban operates as an expenditure limitation." (*SEIU v. FPPC* (1992) 955 F.2d 1312, 1322.) The Ninth Circuit characterized this portion of the ban as an expenditure limit "because it limits the purposes for which money raised by a candidate may be spent." (*Id.)* Thus characterized, an expenditure limit is subject to strict scrutiny and is upheld only if it is narrowly tailored to serve a compelling state interest. (*Id.*) In contrast, the inter-candidate ban would be sustained "only if the state demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms." (*Id.*)

Proposition 73. (*Id.*, at p. 593.) The District Court, however, ruled the contribution limits unconstitutional, rendering the Commission's argument with respect to the transfer ban moot. The Court, however, indicated the Commission's argument "would have significant weight" in the context of valid contribution limits. (*Id.*)[8] Thereafter, the Commission applied contribution limits to intra-candidate transfers made to a committee subject to valid local contribution limits and Proposition 73 special election limits (then section 85305 and regulation 18535). (*See Roberti* Advice Letter, I-92-108; *Riffenburgh* Advice Letter, A-90-761; FPPC Special Election Fact Sheet, 1/11/93.)

2. Contribution Limits

As alluded to above, the *SEIU* decisions also invalidated the contribution limits enacted by Proposition 73. The contribution limits at issue were fiscal year limitations rather than by election, meaning that individuals were limited, for instance, to contributions of $1,000 per year to a given candidate. (§85301, subd.(a); *repealed* by Prop. 208.) The fiscal year limitations were challenged on the basis that they had the effect of unconstitutionally favoring incumbents over challengers. (*SEIU v. FPPC, supra,* 747 F.Supp. at p. 587.)[9] Based on the evidence at trial, the court concluded the statute operated in favor of incumbents, stating:

> "...[I]ncumbents have a significant natural advantage over challengers. Moreover, given the way the statute works, an elected official can, and most do, raise substantial amounts of money each of the years of incumbency, while as a general matter challengers cannot, and generally do not, do so. ...
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> "... Although challengers need not outspend incumbents in order to win, they must raise significant amounts of money to reach a threshold level of name recognition and candidate viability. Thus, the effect of the fiscal year provisions is to favor the fundraising efforts of incumbents to the disadvantage of those who challenge them for office. ..." (*Id.*, at p. 588; internal footnotes omitted.)

Because contributions "translate into speech, the favoring of incumbents over challengers constitutes a significant impediment to fair access to the electoral process."

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[8] As can be seen, the courts regarded the ban on intra-candidate transfers as a limitation on expenditures while the inter-candidate ban was viewed simply as a contribution limitation. Differentiating between the two, the district court found the inter-candidate ban subject to a less strict standard of review, stating that "…even if the transfer is for the purpose of forwarding the transferor's ambition for legislative leadership, it is not transmuted into political speech until expended by the transferee. Under this analysis, it appears to the court that transfers from candidates ought to enjoy a status and protection no different than that accorded donations in general." (*SEIU v. FPPC, supra,* 747 F.Supp. at p. 591.)

[9] Although apparently less than clear, the district court understood the challenge by plaintiffs to be based not on the Equal Protection Clause of the 14th Amendment but rather that the proposition effected a "deprivation or diminution of the First Amendment rights" of challengers. (*SEIU v. FPPC, supra,* 747 F.Supp. at p. 587, fn.13.) The court termed this a "First/Fourteenth" attack. (*Id.*)

(*Id*., at p. 590.) Accordingly, the court concluded the fiscal year limitation unconstitutionally restricted free speech and favored incumbents against challengers in violation of the First and Fourteenth Amendments to the Constitution. In affirming the trial court's conclusion, the Ninth Circuit stated the United Supreme Court has established that "government must remain scrupulously neutral when it regulates activity protected by the First Amendment. The Court has not hesitated to strike down laws that are facially neutral but have a discriminatory impact on First Amendment rights." (*SEIU v. FPPC, supra*, 955 F.2d at pp. 1320-1321.)

3. Conclusions

The *SEIU* cases are instructive on several grounds. First, unlike the statute at issue in *SEIU*, section 85306 does not ban transfers. Rather, it requires attribution of those transfers. Second, unlike Proposition 73, Proposition 34's contribution limits have not been challenged. Thus, the important state interest in preserving the integrity of elections by requiring attribution in certain circumstances remains intact. Also, transfer restrictions appear valid when they compliment a valid contribution limit scheme.

Finally, and perhaps most importantly, these cases warn that where a statute, even if facially neutral, has a discriminatory impact on challengers in favor of incumbents, the statute is susceptible to a serious constitutional challenge.

B. Voter Intent:

In interpreting the words of any statute, one often considers arguments interpreting "legislative intent." The "legislative intent" in construction of a voter-passed initiative, however, is not the intent of the Legislature but the intent of the *voters*. (*Taxpayers to Limit Campaign Spending v. FPPC* (1990) 51 Cal.3d 744, 764.) Regardless of what the legislative drafters may have intended, if that interpretation was not made known to the voters then it cannot be said that the voters embraced or shared that interpretation. (*Id*., at p. 764, fn. 10.) The most common source of the voters' intent can be found in the ballot materials present at the time of election.

Over the years, the voters have tried many times to establish campaign contribution limits, only to have successive attempts thrown out in court due to constitutional infirmity. Proposition 34 was presented as a common-sense measure that "sets enforceable constitutional limits on campaign financing where none exist today." (Ballot Measure Summary, Cal. General Election, Nov. 2000, Prop. 34, Page 2.) The Legislative Analyst's summary of the initiative indicates throughout that the measure was intended to limit campaign fund transfers and contributions. (*Id*., at p. 12-15.) Championing the initiative as the voters' chance to "clamp a lid on campaign contributions," the initiative's supporters lamented:

> "Currently there are no limits on what politicians can collect and spend to get elected to state office. California is still the wild west when it comes to campaign fundraising. Six figure campaign

> contributions are routine. Proposition 34 finally sets enforceable limits and puts voters back in charge of California's political process.
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> "PROPOSITION 34 LIMITS POLITICAL CONTRIBUTIONS. Proposition 34 brings strict contribution limits to every state office. These limits are tough enough to rein in special interests and reasonable enough to be upheld by the courts…." (*Id*., at p. 16.)

The importance of elections held under valid contribution limits was emphasized by supporters in rebuttal to ballot arguments made against the initiative:

> "PROPOSITION 34 WILL PUT THE BRAKES ON SPECIAL INTEREST DOLLARS. Special interests will be limited in what they can contribute to candidates.
> "…"
> Unlike other reform measures, Proposition 34 was drafted by experts to fully comply with all court rulings. It will allow candidates to spend enough to campaign effectively without allowing special interests to buy elections." (*Id*., at p. 17.)

C. Other Provisions of the Act:

Viewed as a whole, the Act treats campaigns as a closed system by each election. Thus, the "one-bank account rule" of sections 85200 and 85201 requires that all expenditures and receipts from and to a campaign for an elective office all derive from the same bank account. Funds from one committee cannot be used for another election directly – they must originate from a committee and account set up for the election at issue. (§§ 85200-85201; Regs. 18521, 18536 and 18542.) A committee's funds are treated equally – regardless of their source, the funds held by a committee are subject to the same rules. In other words, there is no separate status accorded one set of funds, such as contributions from certain types of individuals, versus another. Also, even though a candidate may have more than one committee open, each committee reports its own activities separately – the law views each committee as a wholly separate entity – there is no merging of resources for reporting purposes. (§§ 84200 – 84225.) Moreover, once committees are formed for an election subject to Proposition 34's provisions, the Commission has determined in all other respects that all aspects of Proposition 34 apply to that committee.

III. PROPOSED REGULATION

As discussed earlier, the key determination for the Commission to make with regard to section 85306 is when the exceptions of subdivision (b) and (c) apply. Once again, these two subdivisions provide an exception to the requirement of attribution when

a candidate transfers funds among his or her committees.[10] In essence, the Commission must determine what it means to "possess" funds and what it means to "use" those funds to "seek elective office." (§ 85306, subd. (b) and (c).) Construed narrowly, the Commission may determine that candidates may transfer without attribution pre-34 funds only once and thereafter must transfer funds subject to the attribution provision found in subdivision (a). Others suggest, however, that the terms above should be given broad construction such that a candidate may make as many transfers of the funds as the candidate wishes without any temporal or other restrictions.

The draft regulation provides a range of interpretations for the Commission's consideration. Mirroring the structure of the statute, the regulation contains two primary subdivisions – (a) applies to state elective offices *other* than statewide office (interpreting subdivision (b) of the statute) and subdivision (b) of the regulation applies to statewide candidates (interpreting subdivision (c) of the statute). Because the only difference between the two subdivisions is their subject, decisions made with respect to subdivision (a) automatically will be incorporated into subdivision (b). The primary issue is framed by three options which are discussed below.

Decision 1:

This decision determines how and under what circumstances a candidate may make transfers without attribution. The language in "**Option A**" is the narrowest, allowing candidates a one-time transfer without attribution. Under this option, once the funds are transferred, the funds become subject in their entirety to the provisions of subdivision (a) of 85306. This options seeks to minimize the advantage incumbents have over challengers by more quickly bringing pre-34 funds into the post-34 system of attribution than the other options. Accordingly, any *further* transfers would require attribution. This means that after the first transfer from "Committee 1," which originally raised the pre-34 funds, to "Committee 2," which is a committee for an election held after January 1, 2001, Committee 2 can make a transfer to another committee ("Committee 3") of the candidate (should the candidate decide later to run for a different office) but must attribute the funds transferred to contributors to Committee 2, just as in any other transfer situation. (Reg. 18536.) Under this scenario, it is possible that a committee could have no contributors and would be unable to transfer any funds should the candidate change his or her mind and decide to run for a different office.[11] In this event, the funds would eventually become surplus and their disposition would be governed by section 89519.[12]

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[10] It also is important to keep in mind that the regulation does not interpret the statute as prohibiting a candidate from making piecemeal transfers of his or her pre-34 funds. The regulation addresses only those funds that have actually been transferred.

[11] Staff has advised that a transfer from one controlled committee to another belonging to the same candidate is not a contribution by the first committee to the second. (*Fishburn* Advice Letter, No. A-92-162.)

[12] "**§ 89519. Use of Surplus Campaign Funds.**

The language of "**Option B**" allows for unlimited transfers from successive committees belonging to the same candidate *so long as* the committees to which the funds are transferred do not thereafter raise any Proposition 34-limited funds. Once they

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"(a) Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100).

"(b) Surplus campaign funds shall be used only for the following purposes:

"(1) The payment of outstanding campaign debts or elected officer's expenses.

"(2) The repayment of contributions.

"(3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

"(4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.

"(5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.

"(6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

"(c) For purposes of this section, the payment for, or the reimbursement to the state of, the costs of installing and monitoring an electronic security system in the home or office, or both, of a candidate or elected officer who has received threats to his or her physical safety shall be deemed an outstanding campaign debt or elected officer's expense, provided that the threats arise from his or her activities, duties, or status as a candidate or elected officer and that the threats have been reported to and verified by an appropriate law enforcement agency. Verification shall be determined solely by the law enforcement agency to which the threat was reported. The candidate or elected officer shall report any expenditure of campaign funds made pursuant to this section to the commission. The report to the commission shall include the date that the candidate or elected officer informed the law enforcement agency of the threat, the name and the telephone number of the law enforcement agency, and a brief description of the threat. No more than five thousand dollars ($5,000) in surplus campaign funds may be used, cumulatively, by a candidate or elected officer pursuant to this subdivision. Payments made pursuant to this subdivision shall be made during the two years immediately following the date upon which the campaign funds become surplus campaign funds. The candidate or elected officer shall reimburse the surplus fund account for the fair market value of the security system no later than two years immediately following the date upon which the campaign funds became surplus campaign funds. The campaign funds become surplus campaign funds upon sale of the property on which the system is installed, or prior to the closing of the surplus campaign fund account, whichever comes first. The electronic security system shall be the property of the campaign committee of the candidate or elected officer."

are commingled, then the entire set of funds become subject to attribution should the candidate wish to make another transfer.

Some have suggested that some candidates may unfairly be forced to prematurely make a decision regarding future office and risk losing funds as would happen under Option A, above. Because committee termination rules require a candidate to terminate his or her committee within 90 days of losing an election or leaving office, concern has been expressed that Option A language would work an inequity and provide an unfair advantage to officeholders who, not yet subject to termination rules because they are in office, may hold onto their pre-34 money longer before making a transfer. The theory behind this option is that it allows candidates who must transfer their pre-34 funds due to committee termination rules to "park" them in a committee for elective office for which the candidate is considering running. The candidate, forced by termination rules, to move his or her money, is given under this option further time to possibly change his or her mind and run for a different office. By incorporating the non-commingling requirement, however, this option reflects the determination that once a candidate opens a committee for an office and begins raising contributions for that office, then he has "sought" elective office and all of the funds are thereafter subject to attribution pursuant to subdivision (a) of section 85306.

Option B also contains further optional language on line 16 of page 1 of the draft regulation. Whereas the first sentence of **Option B** addresses the issue of raising contributions, this second sentence addresses the issue of expenditures. Some have suggested that candidates should be allowed to make additional transfers without attribution even if some of the pre-34 funds have been used to seek elective office. In other words, even if the candidate has opened a committee for Senate in 2004 and starts making expenditures to file campaign reports, he or she should not be prevented from deciding later to run for a different office and transferring the remaining funds without attribution. This option, however, follows the general policy embodied in the first sentence, by differentiating between expenses necessary to maintain the functioning of the committee and its legal requirements versus expenses related to campaigning for office.[13] Once expenditures for the latter have been made, then the candidate will be

[13] Section 82015, subdivisions (b)(2)(C)(i)-(viii) are as follows:
"(i) Communications that contain express advocacy of the nomination or election of the candidate or the defeat of his or her opponent.
"(ii) Communications that contain reference to the candidate's candidacy for elective office, the candidate's election campaign, or the candidate's or his or her opponent's qualifications for elective office.
"(iii) Solicitation of contributions to the candidate or to third persons for use in support of the candidate or in opposition to his or her opponent.
"(iv) Arranging, coordinating, developing, writing, distributing, preparing, or planning of any communication or activity described in clauses (i), (ii) or (iii), above.
"(v) Recruiting or coordinating campaign activities of campaign volunteers on behalf of the candidate.
"(vi) Preparing campaign budgets.
"(vii) Preparing campaign finance disclosure statements.
"(viii) Communications directed to voters or potential voters as part of activities encouraging or assisting persons to vote if the communication contains express advocacy of the nomination or election of the candidate or the defeat of his or her opponent."

regarded as having "sought" elective office and all funds transferred thereafter will be subject to attribution.

Option C contains the broadest interpretation of section 85306, subdivisions (b) and (c). This option allows unlimited transfers among a candidate's committees of pre-34 monies regardless of whether the funds are commingled with other post-34 funds or whether expenditures are made with respect to campaign activities. Under this option, a candidate may show that any expenditures made from an account with both pre- and post-34 funds came from the post-34 funds. Under this option, the pre-34 funds preserve their pre-34 status so long as they are not actually expended. In the event the candidate expends pre-34 funds, only the actual amount expended is reduced from the pre-34 non-attribution status. Thus, a candidate could make expenditures for office from pre-34 funds, decide to run for a different office and transfer the funds which he or she has not actually used and which he can show are pre-34 funds.

Attached as Exhibit 2 is a diagram showing how the statute would operate under this language. The transfer of $400,000 of pre-34 funds to the Senate election is done without attribution. This first-time attribution is permitted under all scenarios. The difference, however, is that the Senate Committee, after spending $50,000 of the transferred money (the candidate raised only $100,000 in new money but spent a total of $150,000 to get elected, meaning $50,000 of the transferred money was used) to get elected, may now transfer $350,000 without attribution to a 2006 Treasurer committee. The candidate wins the election after spending $600,000 - $500,000 from new funds and $100,000 of the transferred funds. This leaves $250,000 of the pre-34 funds, which the candidate transfers without attribution to a 2014 committee for a seat on the State Board of Equalization. The candidate uses that money to win the election without raising any new funds.

Recommendation: The Enforcement Division supports **Option A**. This version provides the simplest method of application of the statute and serves Enforcement purposes on two grounds: 1) it provides a clear and bright-line rule for the regulated community resulting in greater compliance; 2) cases brought under the statute will entail less resources to establish a prima facie case. The Technical Assistance and Legal divisions have not reached a consensus. None of the divisions believe any of the options are an impermissible reading of the statute. The few differences of opinion fall primarily along policy grounds between Options A and B. None support Option C.

Subdivision (2)

*In the event the Commission chooses **Option C** above, the Commission should elect to delete the language in this draft subdivision.* This subdivision implements the Commission's approval of the following question and draft response from staff's draft "Proposition 34 Fact Sheet" at the December meeting:

> *"6. I am an incumbent legislator, first elected in 2000. My 2000 committee holds funds raised both prior to January 1, 2001, and*

> *after. The committee also has been making expenditures for officeholder expenses, filing disclosure reports, etc. How do I determine the amount of cash that can be transferred without attribution to a future election committee?*
> **Answer:** Only funds held by the committee on January 1, 2001, may be transferred without attribution. (Section 85306(b).) The amount that may be transferred without attribution must be reduced by amounts spent by the committee since January 1, 2001. (Regulation 18536; *Fishburn* Advice Letter, No. A-02-271.)

Thus, under this subdivision expenditures made *after* January 1, 2001, are to be accounted for out of pre-34 funds first. The policy of Option A is consistent with the goal of a rapid transition to a Proposition-34 based election.

Subdivision (3):

This subdivision implements the Commission's approval of the following question and draft response from staff's draft "Proposition 34 Fact Sheet" at the December meeting:

> "*7. I was elected to the Assembly in 2000. My 2000 committee had $50,000 in cash on January 1, 2001, and was redesignated after January 1, 2001, for the 2002 election. The committee now has $100,000 in cash on hand and no debt. May I transfer any of the current cash on hand to a future election committee without attribution?*
> **"Answer:** When the committee was redesignated for 2002, the 2000 committee became a newly formed committee for 2002. (*Gould* Advice Letter, No. A-01-240.) The funds held by the 2000 committee were, in effect, transferred without attribution and became 2002 funds at that time. The funds may be carried over without attribution to a committee established for the next election to the same office. (Reg. 18537.1.) They also may be transferred to a committee established for a future election to a different office, subject to attribution. (Reg. 18531.6(b)(3).)"
>
> "*8. Would the same answer apply if the funds had been transferred from a 2000 committee to a newly formed 2002 committee?*
> **"Answer:** Yes. Once funds were transferred without attribution to a committee established for the 2002 election, they became 2002 funds."

Thus, this subdivision provides that funds that were transferred or redesignated to a committee established for a 2002 election are subject to the attribution requirements of subdivision (a) of section 85306.

Attachment:
Draft Emergency Regulation 18530.2